

**Letter of Findings: 04-20170742
Indiana Sales and Use Tax
For the Years 2013 - 2015**

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Dealership was not entitled to an exemption from use tax assessed on purchases of temporary license plate protector jackets, however Dealership was entitled to a recalculation of use tax assessed on purchases of certain vehicles used in Dealership's rental fleet. Further, Dealership was entitled to a reduction in their sales tax assessment for vehicles delivered out of state and documentation fees which had already been included in taxable sales.

ISSUE

I. Use Tax - Exemption.

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-1-2; IC § 6-2.5-4-1; IC § 6-2.5-3-2; IC § 6-2.5-3-1; IC § 6-2.5-3-4; IC § 6-2.5-5; *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E. 2d 1138 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579 (Ind. 2014); *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96 (Ind. Ct. App. 1974); *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454 (Ind. Ct. App. 1988); [45 IAC 2.2-2-1](#); [45 IAC 2.2-3-4](#); [45 IAC 2.2-3-14](#); Sales Tax Information Bulletin 28S (April 2012).

Taxpayer protests the assessment of tax on certain purchases.

II. Gross Retail Tax - Out-of-State Vehicle Sales.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-2-3; IC § 6-2.5-13-1; [45 IAC 2.2-5-54](#); [45 IAC 2.2-3-5](#); Sales Tax Information Bulletin 28S (April 2012); Letter of Findings 04-20140017 (June 30, 2015).

Taxpayer protests the assessment of tax on sales of vehicles to out-of-state purchasers.

III. Gross Retail Tax - Documentation Fees.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-1-2; IC § 6-2.5-4-1; [45 IAC 2.2-2-1](#); [45 IAC 2.2-4-1](#); Sales Tax Information Bulletin 28S (April 2012); Sales Tax Information Bulletin 28L (July 2007).

Taxpayer protests the assessment of tax on documentation fees charged as a part of the sale of motor vehicles.

IV. Use Tax - Imposition.

Authority: IC § 2.5-3-2; IC § 6-2.5-3-1; [45 IAC 2.2-3-4](#); Sales Tax Information Bulletin 28S (April 2012).

Taxpayer protests the imposition of use tax on certain purchases of capital assets.

STATEMENT OF FACTS

Taxpayer is a new and used car dealership located in Indiana. Taxpayer sells and leases vehicles and has a parts department, service department, and body shop. The majority of Taxpayer's sales are to Indiana and Kentucky residents.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit on Taxpayer's books and records for tax years 2013, 2014, and 2015. The audit resulted in the assessment of additional sales and use tax.

Taxpayer protested the Department's assessments and provided evidence to support its protest. An administrative hearing was held. This Letter of Findings results. Additional facts will be provided as needed.

I. Use Tax - Exemption.

DISCUSSION

The Department conducted a sales and use tax audit on Taxpayer's books and records for tax years 2013, 2014, and 2015. As a result of that audit, use tax was assessed on certain Taxpayer purchases, including purchases of temporary license plate protector jackets ("protector jackets"). Taxpayer believes that purchases of the protector jackets should not be subject to tax.

As a threshold issue, it is a taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012). When an agency is charged with enforcing a statute, the jurisprudence defers to the agency's reasonable interpretation of that statute "over an equally reasonable interpretation by another party." *Indiana Dep't of State Rev. v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014).

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). Tangible personal property purchased in a retail transaction is subject to use tax when the tangible personal property is "stored, used or otherwise consumed in Indiana . . . unless the Indiana state gross retail tax has been collected at the point of purchase." [45 IAC 2.2-3-4](#). When sales tax is not paid as a part of a retail transaction, use tax will be imposed unless the purchase is eligible for an exemption.

As a general rule, all purchases of tangible personal property are taxable unless specifically exempted by statutes or regulations. An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4, [45 IAC 2.2-3-4](#), and [45 IAC 2.2-3-14\(1\)](#). There are also various sales tax exemptions available outlined in [IC 6-2.5-5](#). The exemption from use tax extends to these transactions as well. [45 IAC 2.2-3-14\(2\)](#). A statute which provides a tax exemption, however, is strictly construed against the taxpayer. *Indiana Dep't of State Revenue, Sales Tax Division v. RCA Corp.*, 310 N.E.2d 96, 97 (Ind. Ct. App. 1974). "[W]here such an exemption is claimed, the party claiming the same must show a case, by sufficient evidence, which is clearly within the exact letter of the law." *Id.* at 101 (internal citations omitted). Thus, in applying any tax exemption, the general rule is that "tax exemptions are strictly construed in favor of taxation and against the exemption." *Indiana Dep't of State Revenue v. Kimball Int'l Inc.*, 520 N.E.2d 454, 456 (Ind. Ct. App. 1988).

Taxpayer relies on Sales Tax Information Bulletin 28S (April 2012), *20120530 Ind. Reg. 045120259NRA* in claiming that "[t]he [Temporary] License plate protector [jacket] is not a repair nor service to the vehicle, but something mounted on the vehicle upon sale, therefore we feel we do not owe tax on this purchase." Taxpayer's reliance is misplaced. The section of Sales Tax Information Bulletin 28S which Taxpayer relies on pertains to shop supplies consumed by vehicle dealers and reads:

Consumable supplies, such as masking paper and tape, oil dry, sandpaper, buffing pads, rags, and cleaning supplies, used by a dealer to repair and service motor vehicles are not exempt purchases by the dealer. The dealer should pay tax on these types of purchases or remit use tax on the cost of these purchases on the dealer's sales tax return. The purchaser (dealer) becomes the final consumer of such items because its customers do not become the owners of such consumable supplies. Although a dealer may charge the customer a fee for the dealer's consumption of these materials, such items are not being sold to the customer in a retail transaction, and sales tax is not to be collected from the customer.

Thus, items consumed in the repair or servicing of vehicles are not exempt from tax as the dealer is the final consumer of these items. It does not necessarily follow that because a temporary license plate protector jacket is not a repair or service item, it should be exempt from tax. As stated above, as a general rule all purchases of tangible personal property are taxable unless specifically exempted by statutes. There are several sales tax exemptions outlined in IC § 6-2.5-5, however, none of these exemptions are applicable to temporary license plate protector jackets.

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Retail Tax - Out-of-State Vehicle Sales.

DISCUSSION

As a result of the audit, the Department found "a number of vehicle sales where Indiana sales tax was not collected by the [T]axpayer." According to Taxpayer, these sales were "sales in interstate commerce" and were therefore not subject to Indiana tax. Taxpayer specifically protests two sales that were made to non-resident purchasers. In each case, Taxpayer claims that its employees delivered the vehicles to the purchasers outside of Indiana.

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 *et seq.* The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction. IC § 6-2.5-2-1(b). For transactions involving the sale of an automobile, [45 IAC 2.2-3-5\(c\)](#) states that "[i]f the vehicle is purchased from a registered Indiana motor vehicle dealer, the dealer must collect the tax and provide the purchaser a completed form ST-108 showing that the tax has been paid to [the dealer]." If the purchaser intends to transport the vehicle outside of Indiana within thirty days after delivery and will title or register that vehicle in another state or country, the tax collected should be calculated using the rate of that state. IC § 6-2.5-2-3(b).

The purchaser must pay sales tax "unless such purchaser is entitled to one or more of the exemptions as provided on form ST-108." [45 IAC 2.2-3-5\(b\)](#). The only acceptable exemptions are those claimed for "reasons listed on the reverse side of the revised form ST-108." [45 IAC 2.2-3-5\(f\)](#). If a purchaser claims an exemption for a reason not listed of the form ST-108, "the dealer . . . must collect sales tax in the usual manner" and "[t]he purchaser may apply for a refund of this tax from the Indiana Department of Revenue" [45 IAC 2.2-3-5\(g\)](#).

A non-resident purchaser may be exempt from Indiana sales tax if the sale is sourced outside of Indiana. "When [a] product is received by the purchaser at a business location of the seller, the sale is sourced to that business location." IC § 6-2.5-13-1(d)(1). Otherwise, "the sale is sourced to the location where receipt by the purchaser . . . occurs, including the location indicated by instructions for delivery to the purchaser" IC § 6-2.5-13-1(d)(2). "Delivery to common carrier in Indiana for shipment to another state . . . shall be deemed delivery to purchaser in a state other than Indiana for purposes of applying the gross retail tax or use tax." [45 IAC 2.2-5-54\(c\)\(1\)](#).

The Department has issued guidelines for the treatment of these sales and for when those sales are exempted:

A vehicle or trailer sold in **interstate commerce** is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce," the vehicle or trailer **must be physically delivered, by the selling dealer to a delivery point outside Indiana**. The delivery may be made by the dealer, or the dealer may hire a third-party carrier. Terms and the method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale. The exemption does not apply to sales to out-of-state buyers in which the buyer takes physical possession of a vehicle or trailer in Indiana, nor is the exemption valid if the buyer, and not the seller, hires a third-party carrier to transport the vehicle or trailer outside Indiana. If the buyer hires the carrier, the carrier is

acting as an agent for the buyer; thus, the buyer takes physical possession within Indiana. Possession taken within the state does not qualify as an interstate sale. Sales Tax Information Bulletin 28S.

In order to prove that a vehicle was sold outside of Indiana and therefore qualifies for exemption, it is important to document the terms of delivery. Letter of Findings 04-20140017 (June 30, 2015), *20150826 Ind. Reg. 045150269NRA* (holding that taxpayer, an Indiana car dealership, did not provide adequate documentation to verify its position that certain vehicles were delivered out of state and therefore exempt from sales tax). In the instant case, the Department was able to verify that both vehicles were delivered by Taxpayer's employees to the respective purchasers at an out-of-state location. Therefore, these two sales should not be subject to Indiana sales tax. A supplemental audit will be performed to remove these two sales from additional taxable sales.

FINDING

Taxpayer's protest is sustained. A supplemental audit will be performed to remove the two sales referenced above from additional taxable sales.

III. Gross Retail Tax - Documentation Fees.

DISCUSSION

Included in the additional taxable sales were administrative fees charged on leased vehicles. Taxpayer states that these fees are "documentation fees" and points out that Sales Tax Information Bulletin 28L (July 2007), *20070801 Ind. Reg. 045070433NRA* does not include such fees as taxable items. Taxpayer further states that "Information Bulletin #28S . . . states [that] [d]ocumentation fees for services performed after the transfer of a vehicle or trailer are not considered part of the sales price and therefore, are not subject to sales tax. We feel that because this is a fee for filling out paperwork to title [the] vehicle[s] after the sale/lease of a vehicle, it should not be taxable."

As stated above, Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a); [45 IAC 2.2-2-1](#). A retail transaction is a transaction made by a retail merchant that constitutes "selling at retail." IC § 6-2.5-1-2(a). Selling at retail occurs when a person "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration." IC § 6-2.5-4-1(b). A person who acquires tangible personal property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

The issue here is whether administrative fees for filling out titling paperwork should be included in the taxable sales amount. IC § 6-2.5-1-5(a)(3) defines "gross retail income" as "the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without deduction for . . . **charges by the seller for any services necessary to complete the sale**, other than delivery and installation charges" (**Emphasis added**).

[45 IAC 2.2-4-1](#) further explains, in part:

- (a) **Where ownership of tangible personal property is transferred for a consideration, it will be considered a transaction of a retail merchant constituting selling at retail unless the seller is not acting as a "retail merchant".**
- (b) **All elements of consideration are included in gross retail income subject to tax.** Elements of consideration include, but are not limited to:
 - (1) The price arrived at between purchaser and seller.
 - (2) **Any additional bona fide charges added to or included in such price** for preparation, fabrication, alteration, modification, finishing, completion, delivery, or **other services performed in respect to** or labor charges for work done with respect to **such property prior to transfer**.
 - (3) **No deduction from gross receipts is permitted for services performed or work done on behalf of the seller prior to transfer of such property at retail.**

(**Emphasis added**).

Sales Tax Information Bulletin 28L, as in effect for the years at issue, does not address the taxability of documentation or administrative fees. Sales Tax Information Bulletin 28S, as in effect for the tax years at issue, does address documentation fees, specifically under Part II, Amount Subject to Tax, Section C, Documentation Fees. This section states that:

Documentation fees for services performed **after the transfer** of a vehicle or trailer are not considered part of the sales price and, therefore, are not subject to sales tax. Transfer of a vehicle or trailer takes place when the purchaser takes possession and control of the property and assumes the risk of loss, even though the title has not yet been transferred. The dealer must maintain adequate records to show which services pertain to the fees charged and that the services were performed after the transfer of the vehicle or trailer to be exempted from sales tax. Documentation fees charged for services performed **prior to the customer taking physical possession** of the vehicle or trailer are subject to sales tax.

Taxpayer charges customers a documentation fee on the sale or lease of a vehicle. According to Taxpayer, the charge is for "filling out paperwork to title vehicle after the sale/lease of a vehicle." These charges are listed on the sales invoice and are included in the total sales price. Title paperwork must be filled out before the transfer of the vehicle is final, thus, under IC § 6-2.5-1-5(a)(3), filling out title paperwork is a "service[]" necessary to complete the sale." Further, Taxpayer fills out this paperwork prior to the customer taking physical possession of the vehicle, thus, the charges are properly subject to tax.

Taxpayer's argument that the fees should not be subject to sales tax is denied. However, in reviewing Taxpayer's documentation, it appears that Taxpayer includes these fees in the taxable sales amount on its sales invoice. Therefore, the audit should be adjusted to remove the fees from additional taxable sales as the Taxpayer had already charged and remitted the sales tax.

FINDING

Taxpayer's protest is denied, however, because Taxpayer included documentation fees in the sales price of its vehicles, the audit should be adjusted to remove those fees from additional taxable sales.

IV. Use Tax - Imposition.

DISCUSSION

Taxpayer has a fleet of loaner cars which they loan or rent to customers and make available to employees other than full-time employees. Taxpayer capitalized and placed each vehicle on the depreciation schedule. According to the audit report:

[T]axpayer acquired various capital assets during the period on which they failed to pay or accrue tax . . . [t]hese items include loaner vehicles The auditor[']s review of the records revealed that vehicles were being capitalized and depreciated. These service vehicles are being used by the [T]axpayer's employees and by their customers. Customers receive use of a courtesy vehicle while their vehicle is being repaired and /or serviced when requested or deemed necessary by the parties involved. Since the [T]axpayer has capitalized these vehicles and has taken depreciation on the vehicles, use tax is being assessed on the value as shown on the depreciation schedule. Credit has been allowed for use tax paid on these vehicles based on miles driven."

Taxpayer disagreed with the audit's assessments as discussed below:

A. Rented Vehicles

During the audit, some of the vehicles were rented and some were not. Because the vehicles were capitalized and depreciated, the audit treated those vehicles which were rented during the audit period as additional taxable purchases and assessed use tax on the vehicles under the guidance provided by Sales Tax Information Bulletin 28S. This Bulletin states, in pertinent part:

Vehicles provided to other than full-time salespersons . . . are subject to use tax at a rate calculated as the Internal Revenue Service's optional business standard mileage rate times the Indiana sales tax rate. The vehicle dealer is required to pay the tax annually. Dealers are required to keep records of each vehicle, the miles driven, and when use tax was paid for the miles driven.

In lieu of accounting for the miles driven, the dealer can elect to report the use tax on [two] percent of the dealer's cost of purchasing the vehicle for each month (or fraction of a month) that the vehicle is used as a demonstrator, multiplied by the Indiana sales tax rate.

The audit calculated the additional use tax on these vehicles based on the cost of each vehicle, multiplied by two

percent for each month the vehicle was in service. The total was then multiplied by the Indiana use tax rate to determine the additional use tax assessed.

Taxpayer protests the assessment of use tax on its rented vehicles stating that "we have rented each of these vehicles and collected and remitted sales tax for each vehicle each time we have rented it." Taxpayer believes that "[t]o pay a use tax on these vehicles as well as a sales tax would be to double tax them." Further, Taxpayer provided evidence to show that when it rented these vehicles to its customers, it charged sales tax based on the number of days rented at a particular daily rental rate.

The use of the vehicles in Indiana triggered the calculation of use tax for the audit period. As stated above, Indiana imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). Tangible personal property purchased in a retail transaction is subject to use tax when the tangible personal property is "stored, used or otherwise consumed in Indiana . . . unless the Indiana state gross retail tax has been collected at the point of purchase." [45 IAC 2.2-3-4](#). When sales tax is not paid as a part of a retail transaction, use tax will be imposed unless the purchase is eligible for an exemption.

Use tax was properly assessed in this situation as the vehicles were used in Indiana. Audit's calculation of use tax was proper under the guidance of Sales Tax Information Bulletin 28S. Taxpayer, however, is entitled to a credit against this assessment for the sales tax it collected and remitted when the vehicles were rented. A supplemental audit will be conducted to determine how much sales tax was collected and remitted when these vehicles were rented. That amount will become a credit to the use tax assessed in the audit.

B. Unrented Vehicles

The remaining vehicles that were not rented existed merely as a part of Taxpayer's loaner fleet. Again, because the vehicles were capitalized and placed on the depreciation schedule, the audit assessed use tax on the entire cost of the vehicle.

Taxpayer protests this assessment as the vehicles "were purchased to either rent or loan as needed. These vehicles are also available [for] sale at any given moment. Each of these vehicles were put on [Taxpayer's] depreciation schedule because as they are rented or loaned their value would depreciate." Because these vehicles were in the "Rental/loan inventory," Taxpayer does not believe they should be subject to use tax on the entire purchase.

Of the loaner vehicles that were not rented, four were actively loaned during the audit period. Taxpayer does not believe use tax should be assessed on the entire cost of these vehicles, but rather, believes it owes use tax on these vehicles "during the time they were in rental/loaner service." Taxpayer agrees that this use tax should be calculated under the guidance of Sales Tax Information Bulletin 28S or at two percent of cost multiplied by months in service and again by the seven percent Indiana use tax rate.

Two of the loaner vehicles were placed in service towards the end of the audit period but were neither rented nor loaned during the audit period. Taxpayer provided evidence that these vehicles were rented and sales tax charged on the rental after the audit period. Taxpayer asks that because these two loaner vehicles were neither rented nor loaned that they "have no tax liability for these two vehicles."

The final loaner vehicle at issue was one that was purchased in November of 2015 and was available for loan, rental or sale until January 2, 2016. On that date, the vehicle was moved to "be used by [Taxpayer's] Bodyshop manager as his demonstrator. At that time, [Taxpayer] began paying use tax on this vehicle." Taxpayer provided documentation to show that use tax was calculated using the two percent method described in Sales Tax Information Bulletin 28S.

The use of the vehicles in Indiana triggered the calculation of use tax for the audit period. The audit assessed use tax on the cost of these vehicles using the seven percent rate. While use tax should be assessed on these vehicles, it should be assessed under the two percent guidance provided in Sales Tax Information Bulletin 28S. A supplemental audit will be performed to adjust the use tax assessment.

FINDING

Taxpayer's protest is sustained in part and denied in part.

SUMMARY

Taxpayer is sustained on its protest of use tax assessed on vehicles in its rental fleet, and is sustained its protest of sales tax assessed on certain out-of-state vehicle sales and documentation fees. Taxpayer's protest of use tax assessed on temporary license plate protector jackets is denied.

Posted: 10/25/2017 by Legislative Services Agency

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